

APPEAL NO. 010570

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). Contested case hearings (CCH) were held on August 1, 2000, and February 26, 2001, with the record closing on the latter date. The hearing officer determined that the appellant (claimant) was not entitled to supplemental income benefits (SIBs) for the seventh quarter.

Although the claimant was not present at either of the CCHs, he nonetheless appeals asserting certain factual matters not presented to the hearing officer. The respondent (carrier) responds, objecting to the claimant's submission of "documents that were not introduced at the CCH" and otherwise urges affirmance.

DECISION

Affirmed.

First addressing the procedural matters, the record includes an audiotape of a CCH which was convened on August 1, 2000. The claimant was not present although at one point he had contacted an ombudsman who was present at the CCH but had no information regarding the claimant's whereabouts. After admitting some hearing officer and carrier exhibits, the hearing officer announced she would be sending the claimant (and his attorney) a "ten day letter." At a subsequent hearing on February 26, 2001, and in her decision, the hearing officer recited that the claimant's attorney had requested another hearing on August 16, 2000, that the hearing had been rescheduled for December 7, 2000, that the claimant was present but his attorney was not, and that the hearing was rescheduled yet another time to February 26, 2001, with an ombudsman assigned for the claimant. The claimant did not appear at the February 26, 2001, CCH, although the ombudsman represented that claimant was aware of the time, date, and place of the rescheduled CCH. Additional exhibits for both the hearing officer and the carrier were admitted on February 26, 2001. The hearing officer found that neither the claimant nor the claimant's attorney had good cause for failing to appear at the hearings scheduled for December 7, 2000, and February 26, 2001. That finding has not been appealed.

On the merits, the claimant, at the benefit review conference (BRC) on May 4, 2000, proceeded on a total inability to work basis. Sections 408.142 and 408.143 and Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § Rule 130.102 (Rule 130.102) set out the statutory and regulatory requirements for entitlement to SIBs. The hearing officer made certain findings of fact which establish the jurisdictional requirements. At issue in this case is whether the claimant made the requisite good faith effort to obtain employment commensurate with his ability to work and whether the claimant's unemployment/underemployment was a direct result of the impairment from the compensable injury.

Although the BRC report indicates that the claimant was proceeding on a total inability to work, most of the medical reports showed that the claimant could work in a light-

duty capacity and, in fact, the Statement of Employment Status (TWCC-52) in evidence indicated that the claimant had, in fact, worked a portion of the qualifying period which the hearing officer found was from November 27, 1999, through February 25, 2000. The claimant had the burden to prove that he was entitled to the benefits that he seeks and the evidence failed to indicate that he had complied with the requirements of Rule 130.102(d)(4).

The evidence showed that the claimant had worked in some kind of capacity for an automobile dealership in a part-time capacity. There is insufficient evidence in the record to establish that this part-time employment was "a position which is relatively equal to the injured employee's ability to work" within the meaning of Rule 130.102(d)(1) which might also establish the requirement of a good faith effort to obtain employment commensurate with the claimant's ability to work.

We agree with the carrier that it is inappropriate for us to consider records and reports in existence at the time of the CCH, but not presented, for the first time on appeal. Texas Workers' Compensation Commission Appeal No. 000929 decided June 15, 2000.

Accordingly the hearing officer's decision and order are affirmed.

Thomas A. Knapp
Appeals Judge

CONCUR:

Michael B. McShane
Appeals Judge

Philip F. O'Neill
Appeals Judge